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No. 03-

In the Supreme Court of the United States

PETER KAY STERN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment to the United States Constitution as applied by this Court's decisions in *Apprendi v. New* Jersey, 530 U.S. 466 (2000) and *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (U.S. Wash. June 24, 2004), permit a judge, pursuant to the United States Sentencing Guidelines, to enhance a defendant's sentence based on facts not determined by a jury and not admitted by the defendant?

2. Whether this Court should resolve the conflict between circuits over whether a sentence enhancement imposed pursuant to United States Sentencing Guideline § 2A6.1(b)(1) for conduct evidencing the intent to carry out a threat must be supported by the finding of at least one overt act in furtherance of the threat?

3. Whether a district court judge abuses his discretion by not recusing himself when a defendant is on trial for threatening to kidnap the other judges seated on the district court bench, and the trial judge becomes convinced that the defendant intends to carry out those threats?

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PETITION FOR A WRIT OF CERTIORARI

Peter Kay Stern respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit (Pet. App. 2) is unpublished.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Mr. Stern's convictions and sentence was entered on April 23, 2004. (Pet. App. 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation...."

Chapter 28 of the United States Code, Section 455 (a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT

1. On December 7, 1999, a federal grand jury returned a seven-count superceding indictment against the Petitioner, Peter Kay Stern. Count One alleged a conspiracy to submit false and fraudulent refund claims to the United States Internal Revenue Service ("IRS"), 18 U.S.C. § 286; Count Two alleged the obstruction of IRS agents in the performance of their duties, 26 U.S.C. § 7212; Count Three consisted of bank fraud, 18 U.S.C. § 1344; Counts Four and Five alleged two counts of threatening a federal judge, 18 U.S.C. § 115; and Counts Six and Seven alleged the sending of those threats through the United States Postal Service, 18 U.S.C. § 876.

On July 19, 2000, the jury convicted Mr. Stern on all counts. At the Sentencing Hearing, held on January 23, 2002, the district court overruled all of defense counsel's objections to the Pre-Sentence Investigation Report ("PSIR") and sentenced Mr. Stern to 151 months, the maximum time permissible under the United States Sentencing Guidelines ("U.S.S.G." or "Federal Guidelines"). On appeal, Mr. Stern challenged his convictions on the ground that the district court judge, Judge Lacy Thornburg, abused his discretion by denying his motion for recusal. Further, Mr. Stern appealed his sentence on various grounds.

For Counts One and Three, the district court set Mr. Stern's adjusted offense level at 29. This included an adjusted base offense level of 10 (which Mr. Stern did not contest), plus a 12-level enhancement under U.S.S.G. § 2F1.1(b)(1)(M) for fraud resulting in a loss of more than $1,500,000; plus a 4-level enhancement under U.S.S.G. § 3B1.1(a) for Mr. Stern's alleged role in the offense; and a 2-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice.

For Count Two, the district court set Mr. Stern's adjusted offense level at 29. This included an adjusted base offense level of 12 (not contested by Mr. Stern), plus an 8-level enhancement under U.S.S.G. § 2J1.2(b)(1) for "threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice;" an additional 3-level enhancement under U.S.S.G. § 2J1.2(b)(2) for interfering with the administration of justice; plus a 4-level enhancement under U.S.S.G. § 3B1.1(a) for Mr. Stern's alleged role in the offense; and a 2-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice.

Counts Four, Five, Six and Seven were consolidated into two separate Groups and resulted in the exact same sentence because they consisted of the same charges allegedly committed against two different district court judges.[1] The district court set Mr. Stern's adjusted offense level for each Group at 23. This included the adjusted base offense level of 12 for the statutory violations, plus a 6-level enhancement under U.S.S.G. § 2A6.1(b)(1) based on the probation officer's and trial court's finding that the offense involved conduct that evidenced Mr. Stern's intent to actually carry out his threats; plus a 3-level U.S.S.G. § 3A1.2(a) enhancement because the offense was motivated by the victims' government employee status (Mr. Stern did not contest this enhancement); and lastly, a 2-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1.

Based on the application of every enhancement suggested by the PSIR, the trial court imposed a 151-month sentence, the absolute maximum available under the Guidelines.

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[1] Group 2 consisted of Counts Four and Six, and Group 3 consisted of Counts Five and Seven.

(Pet. App. 17). Absent the disputed enhancements, Mr. Stern's Guideline range would have mandated a sentence within the 27 to 33-month range.

2. The Fourth Circuit Court of Appeals affirmed both Mr. Stern's convictions and sentence. Generally, the Petitioner appealed all of the sentence enhancements applied by the trial court on the ground that they violated the principles espoused by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). While Mr. Stern preserved the *Apprendi* argument, he conceded that the Court of Appeals was bound by direct Fourth Circuit precedent holding that courts should apply the "preponderance of the evidence" standard to sentencing factors relevant to Mr. Stern's case. *See United States v. Powell*, 243 F.3d 543 (4th Cir. 2001) (table case). More specifically, Mr. Stern also objected to some of the enhancements on grounds apart from *Apprendi*.

It is the district court's application of various sentencing enhancements, and the appeals court's affirmation of their application, that constitutes the primary basis for this petition.

REASONS FOR GRANTING THE WRIT

On June 24, 2004, this Court struck down the Washington State sentencing guidelines on the basis that they violated a criminal defendant's Sixth Amendment right to trial by jury. *See Blakely v. Washington*, No. 02-1632, 2004 WL 1402697, *6 (U.S. Wash. June 24, 2004). Justice Scalia, writing for the majority, found the Washington system unconstitutional because it permitted a judge to impose an enhanced sentence supported by facts neither admitted by a defendant nor found by a jury. *Id.* at *4. It is submitted that the Federal Guidelines as applied in this case suffer from the same Constitutional infirmities that doomed the Washington

Guidelines and, therefore, should similarly be struck down.

If Petitioner is correct in his belief that this Court's precedent begun in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and now solidified in *Blakely*, mandates that any fact that can increase the punishment for a crime must be submitted to a jury, then this Court should grant certiorari and hold that the Federal Guidelines are unconstitutional to the extent that they allow a judge to increase the Guideline range based on facts neither found by a jury nor admitted by the defendant.

It is further submitted that this Court should grant certiorari to resolve the split between circuits regarding whether an overt act is a required basis for imposing an upward departure under U.S.S.G. 2A6.1(b)(1). Lastly, this Court should grant certiorari and find that Judge Thornburg abused his discretion by not recusing himself.

I THE FEDERAL SENTENCING GUIDELINES SHOULD BE FOUND UNCONSTITUTIONAL AS APPLIED TO PETITIONER BECAUSE THEY PERMITTED THE DISTRICT COURT JUDGE TO INCREASE THE PETITIONER'S SENTENCE ON FACTS NEITHER FOUND BY A JURY NOR ADMITTED BY THE DEFENDANT.

A. *Blakely* and the Washington Sentencing Guidelines.

In *Blakely*, the defendant pled guilty to second - degree kidnaping involving domestic violence and use of a firearm, but admitted no facts apart from those necessary to constitute the elements of the charged offenses. *Blakely*, 2004 WL 1402697

at *2. Under the Washington Guidelines, Blakely's kidnaping charge carried a standard range of 49 to 53 months. *See* Wash. Rev. Code § 9.94A.320. However, Washington's Sentencing Reform Act permitted a judge to enhance a defendant's sentence beyond the standard range based on the presence of any aggravating factors justifying such an upward departure. § 9.94A.390 (providing a non-exhaustive list of examples). Any such departure, however, must be founded on facts *not* already used in establishing the standard range. *See State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001). The court's findings are determined by a "preponderance of the evidence" standard. Wash. Rev. Code § 9.94A.370(2).

After holding a hearing complete with witness testimony, the court made 32 findings of fact and imposed a sentence of 90 months -- 37 months over the standard range maximum. *See Blakely*, 2004 WL 1402697 at * 3. The judge based this departure primarily on his belief that Blakely committed the act with "deliberate cruelty," a specified aggravating factor contained in the Washington Code. *See* § 9.94A.390(2)(h)(iii). The Washington Court of Appeals affirmed Blakely's sentence[2] and the Washington Supreme Court denied discretionary review. 148 Wash.2d 1010, 62 P.3d 889 (2003).

Upon review, this Court held that Washington's Sentencing Guidelines were inconsistent with the Constitution's guarantee of a trial by jury to all criminal defendants and, therefore, reversed and remanded the case. Justice Scalia reiterated this Court's holding in *Apprendi* that:

[o]ther than the fact of a prior conviction, **any**

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[2] 111 Wash.App. 851, 47 P.3d 149 (2002).

> fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Blakely, 2004 WL 1402697 at *4 *citing Apprendi*, 530 U.S. at 490 (emphasis added). Absent *Apprendi's* restriction, Justice Scalia continued, "the jury would not exercise the control that the Framers intended." *Blakely*, 2004 WL 1402697 at *6.

In sum, this Court established, once and for all, that the relevant inquiry truly is "one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494 (footnote omitted). This reasoning must apply to any sentencing guideline structure, state or federal, that takes facts used to increase a defendant's punishment out of the jury's hands and places them into those of the judge.

B. *Blakely* and the Federal Sentencing Guidelines.

Although *Blakely* expresses no opinion on the constitutionality of the Federal Sentencing Guidelines, it is difficult to imagine any argument that can cure its Constitutional infirmities. Even some of *Blakely's* dissenters have acknowledged the Federal Guidelines' vulnerability to a *Blakely/Apprendi* challenge. *See Blakely*, 2004 WL 1402697 at *16 (O'Connor, J., dissenting) ("[i]f anything, the structural differences that do exist make the Federal Guidelines *more vulnerable to attack*) (emphasis added); *see also id.* at *29 (Breyer, J., dissenting) ("[p]erhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.").

First, while the Federal Guidelines are established by the

Sentencing Commission, and not the legislature (as was the case in Washington), they have the effect of law and prescribe the sentences criminal defendants *shall* receive. *See Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts."); *see also Blakely*, 2004 WL 1402697 at *16 (O'Connor, J., dissenting) ("The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning."); *see generally United States v. Stinson*, 508 U.S. 36 (1993). Because the Federal Guidelines are as much law as those challenged in Washington, *Blakely* requires the same result.

Second, the Federal government filed an *amicus curiae* brief on behalf of Washington State in *Blakely*, warning the Court that accepting the Petitioner's argument would seriously question the validity of the Federal Guidelines because "facts other than the elements of the offense enter into almost all of the calculations under the Guidelines...."[3] Further, since *Blakely* was decided, the lower courts have declined to find any distinction between the guidelines struck down in *Blakely* and the Federal Guidelines.

The first cases to address *Blakely* are consistent with Petitioner's position that the Federal Sentencing Guidelines, as applied, cannot survive a *Blakely* challenge. In *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 WL 1462111, (D. Utah, June 29, 2004) the United States District Court of Utah, Central Division, held the Federal Sentencing Guidelines unconstitutional as applied to the defendant. The district court stated:

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[3] *See* Brief for the United States as Amicus Curiae Supporting Respondent at 26.

> [a] sentence may not be enhanced when doing so requires the judge to make factual findings which go beyond the defendant's plea or the verdict of the jury. Given this rule, there is no way this court can sentence Croxford under the federal sentencing guidelines without violating his right to trial by jury as guaranteed by the Sixth Amendment.

Id. at *6.

Just one day later, the United States District Court for West Virginia, Southern District, similarly held *Blakely* applicable to the Federal Guidelines. *See United States v. Shamblin*, No. CRIM.A. 2:03-00217, 2004 WL 1468561, *8 (S.D.W.Va., June 30, 2004). There, the trial court originally sentenced the defendant to 240 months in prison for conspiring to manufacture methamphetamine. *Id.* at *9. His sentence was comprised almost entirely of enhancements never submitted to the jury or admitted by the defendant. *Id.* at *10. The court held that "[b]ased on only those sentencing factors that Shamblin admitted during his plea, I FIND that his sentencing range under the Guidelines is 6 to 12 months." *Id.* at *9 (emphasis in original).

Finally, the Court of Appeals for the Seventh Circuit recently reversed and remanded a defendant's sentence because the trial court enhanced his punishment based on the judge's own "preponderance of the evidence" findings that the defendant had obstructed justice and distributed 566 grams of cocaine base. *United States v. Booker*, No. 03-4225, slip op. at 1 (7th Cir. July 9, 2004). The Court expressed no opinion on whether *Blakely* mandated the fall of the entire Federal Guidelines but, rather, simply found that any portion of the Guidelines that require the sentencing judge to make certain

findings "that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence" are unconstitutional. *Id.* at *10.

It is submitted that precisely the same analysis utilized by this Court to find the Washington Guidelines unconstitutional should apply to the Federal Guidelines. Because *Blakely* held that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose based solely on facts found by the jury or admitted by the defendant, it is irrelevant whether it is a state or federal system that is challenged. It is the effect of the violation that controls the Constitutionality of the action, and this Court has clearly held that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 2004 WL 1402697 at *9 (emphasis in original). According to *Blakely*, any system that enhances a defendant's punishment yet fails to provide this basic Sixth Amendment protection, must be struck down.

II THIS COURT SHOULD FIND THAT THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY AFFIRMING PETITIONER'S SENTENCE WHEN THE DISTRICT COURT BASED HIS SENTENCE ON FACTS NEVER ADMITTED BY MR. STERN OR FOUND BY A JURY BEYOND A REASONABLE DOUBT.

As stated previously, *Blakely* holds that any fact that increases the maximum available guideline sentence must be either proved to a jury beyond a reasonable doubt or admitted by the defendant. 2004 WL 1402697 at *4. Therefore, any sentence that contravenes this Constitutional principle must be vacated. In Petitioner's case, unconstitutional enhancements

increased his sentence by 118 months.[4] Accordingly, it is submitted that any sentence enhancements that substituted the court's or the probation officer's findings based on a "preponderance of the evidence" standard, for those of the jury, or the defendant's own admissions, were imposed in violation of the Sixth Amendment.

It is submitted that at the very least, Mr. Stern's enhancements under the following Federal Guidelines must be vacated: (1) U.S.S.G. § 2A6.1(b)(1) - conduct evidencing intent to carry out threats; (2) § 2J1.2(b)(1) - threatening to cause injury, or property damage, to obstruct the administration of justice; (3) § 2J1.2(b)(2) - interfering with the administration of justice; (4) § 2F1.1(b)(1)(M) - attempted fraud in excess of $1,500,000; (5) § 3B1.1 (a) - role in the offense; and (6) § 3C1.1 - obstruction of justice.[5]

The sentence enhancements listed above were based on determinations found by the court and not a jury, and were never subjected to a "beyond a reasonable doubt" analysis. As such, Mr. Stern's sentence should be vacated and remanded for resentencing not inconsistent with the Constitution and this Court's ruling in *Blakely*.

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[4] *See* Statement, *supra* at 4 (relating that, absent the various enhancements, Mr. Stern's sentence range would be 27 to 33 months). The trial court subsequently sentenced him to 151 months.

[5] Obstruction of justice was specifically found by the Seventh Circuit in *Booker* to warrant the remanding of a case for resentencing. *See* No. 03-4225, slip op. at 9 ("[w]e conclude that Booker has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice."). Here, the trial court enhanced Mr. Stern's sentence on four different counts for obstruction of justice.

III THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY OVER WHETHER AN OVERT ACT IS A REQUIRED BASIS FOR IMPOSING AN UPWARD DEPARTURE UNDER U.S.S.G. § 2A6.1(b)(1).

Federal Guideline § 2A6.1(b)(1) provides for a 6-level enhancement in a defendant's base offense level for violation of 18 U.S.C. §§ 115 and 876 "[i]f the offense involved any conduct evidencing an intent to carry out such a threat." The Commentary states that when determining the applicability of this Guideline, "the focus should be [on] the defendant's intent and the likelihood that the defendant would carry out the threat." § 2A6.1, comment. (n.1). The grounds for this enhancement as originally contained in the PSIR was that Petitioner had the means and desire to carry out the threats because prior to making them he had established a common law "court" and had previously threatened IRS agents with arrest by the court's constables. (Pet. App. 18-19). The district court overruled Petitioner's objection to the enhancement without any explanation.

On appeal, the Fourth Circuit affirmed the district court's decision to impose the § 2A6.1(b)(1) enhancement. Critical to the appeals court's decision was the following:

> ...Stern was the Chief Justice of 'Our One Supreme Court,' a court largely created by him and which had a court rule providing that its dictates would be enforced by armed militia. Stern also kept many firearms at his home within easy reach, some of which he kept loaded. When all of this evidence is considered, as a whole, with Stern's threats in the kidnaping

> documents to use Our One Supreme Court's "lawful special appointed constables [to] make appropriate apprehension of" Judges Mullen and Voorhees unless such individuals met the court's demand to release John Anthony Norris, the conclusion is inescapable that Stern engaged in conduct substantially and directly connected to the offense....

Pet. App. 12-13. As evidenced by the PSIR and the appeals court's opinion, none of the factors relied on in enhancing Petitioner's sentence constituted an overt act evidencing Mr. Stern's intent to carry out the threats. In the three and one-half years between the writing of the letters and Petitioner's arrest, not one act was taken toward carrying out the threats. Even the government conceded the lack of evidence on this point in its closing argument. *See* Pet. App. 16 ("Did he [Stern] ever carry them out? No. Did he ever attempt to carry them out? We don't know.").

In confronting what evidence constitutes proof of a defendant's intent to carry out a threat for purposes of the § 2A6.1(b)(1) enhancement, the Fifth Circuit recognized a split among its sister circuits over whether an overt act was required to support such an enhancement. *United States v. Goynes*, 175 F.3d 350, 353 (5th Cir. 1999) ("most circuit courts require that a defendant engage in some form of overt act before sustaining a § 2A6.1(b)(1) enhancement.").[6] Faced with a division over

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[6] *See United States v. Newell*, 309 F.3d 396, 399 (6th Cir. 2002) (enhancement imposed because defendant purchased weapon on same day he made threat); *United States v. Gary*, 18 F.3d 1123 (4th Cir. 1994) (defendant issued repeated threats, visited the victim's home, and vandalized her home and car); *State v. Berndt*, 127 F.3d 251 (2d Cir. 1997) (defendant traveled to victim's home in Germany and entered property

the issue among circuits, the *Goynes* court specifically held that "an overt act" evidencing an intent to carry out the threat is *necessary* to sustain a § 2A6.1(b)(1) enhancement. *Id.* (Emphasis added). In particular, the *Goynes* court found evidence that the defendant wrote three "extremely violent" letters threatening the victims *insufficient* to sustain the enhancement. *Id.* at 355. (Emphasis added). Although the court found one of the letters written in blood to be particularly disturbing, "it is not in any way an actual step toward the realization of Goynes' threats." *Id.*

The Seventh Circuit, however, has arrived at the exact opposite conclusion than that of the Fifth Circuit in *Goynes*. In *United States v. Thomas*, the court upheld the defendant's § 2A6.1(b)(1) enhancement despite the lack of any overt act evidencing his intent to carry out the threat. 155 F.3d 833, 837 (7th Cir. 1998), *cert. denied*, 520 U.S. 1048, 119 S.Ct. 606 (1998). The trial court had imposed the enhancement merely because the defendant's letters were "very violent" and he (the defendant) had stated that he would "take a battery charge" if he ever saw the victim on the street. *Id.* at 837. The court ruled that the letters themselves were sufficient to support the § 2A6.1(b)(1) enhancement. *Id.* at 839.

Coupled with the decision below regarding Petitioner's § 2A6.1(b)(1) enhancement, there is a genuine uncertainty between circuits (even within the Fourth Circuit itself) over what evidence is sufficient to support a finding that the defendant intended to carry out his threats. As found by the court in *Goynes*, the overwhelming majority of circuits require that the defendant engage in some sort of overt act before enhancing the sentence by an additional 6 levels. *See Goynes*,

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without permission).

175 F.3d at 353. It is submitted that this Court should grant certiorari to resolve this conflict in order to prevent defendants from being given enhanced sentences for the same conduct for which they have already been sentenced.

IV THIS COURT SHOULD FIND THAT JUDGE THORNBURG ABUSED HIS DISCRETION BY NOT RECUSING HIMSELF FROM THE TRIAL

Under 28 U.S.C. § 455(a) a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." According to this Court, the standard is whether "a reasonable person, knowing all the facts, would harbor doubts concerning the judge's impartiality." *Liljberg v. Health Serv. Corp.*, 486 U.S. 847, 860 (1988). The Fifth Circuit determined that the rationale behind § 455(a) is to ensure the public's confidence in the judicial system by avoiding even the appearance of impartiality. *United States v. Johnson*, 49 F.3d 152, 154 (5th Cir. 1995). The standard is an objective one, meaning the individual judge's mind does not factor into § 455(a) determinations. *Id.*

In addition, the Fourth Circuit requires that the alleged bias derive from an extra-judicial source. *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987). This requirement prevents defendants from utilizing § 455(a) as a ploy merely to continually request a new judge's recusal. *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994). Lastly, in order to remand on a violation of § 455(a), the reviewing court must find that the failure to recuse did not result in harmless error. *Id.* at 1007 (citing *Liljberg*, 486 U.S. 847).

At the time of Mr. Stern's trial in 2000, the United States District Court for the Western District of North Carolina

was comprised of only three judges: Chief Judge Mullen, Judge Voorhees and Judge Thornburg. As mentioned previously, Mr. Stern's charges under 18 U.S.C. § 115 were for letters he had sent threatening to kidnap both Judge Mullen and Judge Voorhees. Therefore, not only did Mr. Stern allegedly threaten Judge Thornburg's colleague, Judge Voorhees, but also his superior, Chief Judge Mullen.

It is submitted that this case should be reversed and remanded due to Judge Thornburg's failure to recuse himself. Clearly, a reasonable person, knowing the nature of Mr. Stern's charges and Judge Thornburg's relationship to both Judge Mullen and Judge Voorhees, would "harbor doubts" over Judge Thornburg's ability to remain impartial. *See Liljberg*, 486 U.S. at 860. At the very least, Judge Thornburg's decision not to recuse himself from Mr. Stern's trial created the appearance of impartiality, the exact purpose for the enactment of § 455(a). A reasonable person would question the impartiality of the judge presiding over a case where his fellow judge and colleague is the victim, or closely related to the victim, of the crime for which the defendant is on trial. The Ohio Supreme Court came to this conclusion and acknowledged the need for recusal under such circumstances. *See The State of Ohio v. Rindfleisch*, 546 N.E.2d 927 (OH Sup. Ct. 1987) (holding that the judge presiding over a murder trial where the victim was the nephew of his fellow judge should have recused himself).

Further, the record is clear that Mr. Stern's threats against Judges Mullen and Voorhees originated from extra-judicial sources. The threats occurred over four years prior to Mr. Stern's trial and, therefore, could not have been a ploy to obtain a new judge. Finally, Petitioner submits that Judge Thornburg's failure to recuse himself did not result in harmless error. In *Greenspan*, the judge sentenced the defendant within the applicable Federal Guideline range. 26 F.3d at 1007.

However, because the judge sentenced the defendant at the high end of the range, the court remanded the case for resentencing. *Id.*

In the instant case, not only did Judge Thornburg sentence Petitioner to the high end of the Federal Guideline range, but he substantially enhanced Mr. Stern's sentence on every single count of conviction. As for the counts containing the threats against Judge Thornburg's colleague and superior, Judge Thornburg applied the 6-level § 2A6.1(b)(1) enhancement absent any evidence that Mr. Stern ever intended to carry out the threats. Additionally, Judge Thornburg overruled every single defense objection to the probation officer's recommendations and denied Mr. Stern the opportunity to call any witnesses on his behalf. It is submitted that the trial judge abused his discretion in refusing to recuse himself and, therefore, this case should be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

John Kenneth Zwerling
Counsel of Record
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108 North Alfred Street
Alexandria, Virginia 22314
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July 2004

No. 03-

In the Supreme Court of the United States

PETER KAY STERN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER APPENDIX

John Kenneth Zwerling
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 02-4091
PETER KAY STERN, a/k/a Peter K. Stern, *Defendant-Appellant.*	)	

Appeal from the United States District Court
for the Western District of North Carolina, at Bryson City.
Lacy H. Thornburg, District Judge.
(CR-99- 81)

Argued: February 27, 2004

Decided: April 23, 2004

Before NIEMEYER and SHEDD, Circuit Judges,
and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Kenneth Zwerling, ZWERLING & KEMLER, Alexandria, Virginia, for Appellant. David Alan Brown, Assistant United States Attorney, Charlotte, North

Carolina, for Appellee. **ON BRIEF:** Robert J. Conrad, Jr., United States Attorney, Brian Lee Whisler, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

On December 7, 1999, a federal grand jury sitting in the Western District of North Carolina indicted Peter Kay Stern (Stern) on one count of conspiracy to submit false and fraudulent refund claims to the United States Internal Revenue Service (IRS), 18 U.S.C. § 286, one count of obstructing the work of IRS agents, 26 U.S.C. § 7212(a), one count of bank fraud, 18 U.S.C. § 1344, two counts of threatening a federal judge, 18 U.S.C. § 115, and two counts of using the United States Postal Service mail system to communicate threats to a federal judge, 18 U.S.C. § 876. Following a jury trial, Stern was convicted on all counts. The district court sentenced him to a term of 151 months' imprisonment. Stern noted a timely appeal. On appeal, Stern challenges the sufficiency of the evidence with respect to his convictions on the obstruction of IRS agents, Count Two, and the bank fraud, Count Three. He also challenges all of his convictions on the basis that the district court judge abused his discretion by denying his (Stern's) motion for recusal. Finally, Stern challenges his sentence on various grounds. We affirm Stern's convictions and his sentence.

I.

A. The Comptroller Warrants.

Beginning in or about November 1995, Stern traveled to Bozeman, Montana, where he attended anti-government seminars presented by Leroy Schweitzer (Schweitzer). Schweitzer and his followers, who were known as "Freeman," operated a compound in Montana, and while he was there, Stern attended a Freeman class, conducted by Schweitzer, during which Stern obtained at least seven documents, each titled "Comptroller Warrant."

Stern subsequently delivered one of these comptroller warrants, in the amount of $77,581.98 and numbered 1809, to the First Union National Bank (First Union) as complete satisfaction of his approximately $40,000 worth of outstanding loans with the bank. Stern requested that First Union refund him the difference in a cashier's check. First Union rejected the comptroller warrant on the ground that it was not a legitimate collectible document.

Stern transmitted some of his other comptroller warrants to other financial institutions and government entities. He also provided some of the comptroller warrants to friends and family members for their use in satisfying debt with financial institutions and the IRS, and for obtaining false and fraudulent refunds. In a letter dated January 3, 1996, the Comptroller of the Currency, Administrator of National Banks for the United States Treasury Department, notified Stern that the comptroller warrants were worthless financial instruments. Stern's conduct with respect to these comptroller warrants is the subject of Counts One and Three of the indictment. Count One charged Stern with conspiracy to submit false claims for payment to the IRS in order to receive false and fraudulent refunds, 18 U.S.C. § 286, and Count Three charged Stern with bank fraud, 18 U.S.C. § 1344.

B. Obstruction of IRS Agents.

In June 1996, in response to IRS efforts to collect overdue federal income taxes from him for tax years 1991 through 1994, Stern began sending letters to the IRS in which he denied his tax obligations and threatened to penalize IRS Officer William Sizer in the amount of one million dollars, as well as report him to the criminal authorities. Thereafter, accompanied by IRS criminal investigator Frank Houle, IRS revenue agents met with Stern in an effort to explain his tax liability.

Shortly thereafter, Stern sent correspondence to the agents, threatening them with criminal investigations and possible arrest if they did not cease their collection activities. Some of Stern's threatening correspondence was purportedly issued by "Our One Supreme Court," which was a common law court located in Macon County, North Carolina. Stern greatly participated in creating Our One Supreme Court around the same time that he had attempted to negotiate the Comptroller Warrants. In response to Stern's threatening correspondence, some IRS agents began taking precautionary measures to ensure their own safety and the safety of their families.

In conducting a threat assessment of Stern, Agent Houle inquired of Stern about his association with Our One Supreme Court. Stern informed Agent Houle that he was the Chief Justice of Our One Supreme Court, and provided Agent Houle a copy of the court's rules. Such rules provided for marshals to serve process and a militia to enforce the dictates of the court with force in arms. Agent Houle's investigation also revealed that Our One Supreme Court had generated numerous documents threatening IRS employees with multimillion dollar judgments and the filing of liens.

Beginning on December 13, 1996, the IRS issued four or five levies on known income sources for Stern. Stern

responded by sending "affidavit[s] of probable cause for the prosecution of criminal acts" to the IRS agents involved in his case, which documents specifically called for the arrest of such agents. (J.A. 226). Concerns for the safety of these IRS agents raised by these documents generally impeded such agents' ability to perform their official duties. In addition, Stern impeded IRS efforts to assess the value of his home by posting a "no trespassing" sign at the entrance to his property. Notably, the sign was specifically directed to federal law enforcement officers and federal civil servants, and warned of consequences to the trespasser.

Stern next filed a petition with the United States Court of Appeals for the Fourth Circuit, seeking injunctive relief to restrain the IRS from collecting unpaid taxes, penalties, and interest from him. In addition, the petition sought compensatory damages for the IRS's actions in attempting to collect his unpaid taxes and for alleged violations of the Freedom of Information Act, 5 U.S.C. § 522. This court denied Stern's petition as "devoid of merit." *In re: Peter Kay Stern*, 114 F.3d 1177, 1997 WL 325437 (4th Cir. June 16, 1997) (unpublished).

As the direct result of Stern's threatening and harassing conduct, the IRS ceased its collection activities with respect to Stern's federal income tax liabilities. At the time of Stern's criminal trial, his federal income tax liabilities remained outstanding.

Stern's conduct in response to the IRS's collection activities is the subject of Count Two of the indictment, which charged him with obstructing the work of IRS agents. 26 U.S.C. § 7212(a).

C. Threatened Kidnappings of Two Federal Judges.

On January 30, 1996, Stern, in his capacity as Chief Justice of Our One Supreme Court, sent a package through the United States Postal Service to the federal courthouse in Charlotte, North Carolina. The package included documents issued by Our One Supreme Court and signed by Stern as Chief Justice, which documents threatened to kidnap United States District Judges Graham C. Mullen and Richard L. Voorhees, if federal prisoner John Anthony Norris was not released from federal custody. The threats led to heightened security measures for the federal judges involved and the district court in general.

Stern's conduct in this regard is the subject of Counts Four, Five, Six, and Seven of the indictment. Count Four charged Stern with threatening to kidnap Judge Mullen, "with intent to impede, intimidate, interfere with, and retaliate against Judge Mullen while he was engaged in or on account of the performance of his official duties," (J.A. 87). 18 U.S.C. § 115. Count Five charged the same crime as Count Four, with the exception that Judge Voorhees was the subject of the kidnapping threat. Count Six charged Stern with sending a threatening communication (i.e., the threat to kidnap Judge Mullen) through the United States Postal Service. 18 U.S.C. § 876. Count Seven charged the same crime as Count Six, with the exception that Judge Voorhees was the subject of the kidnapping threat.

II.

We first address Stern's challenge to the sufficiency of the evidence to sustain his conviction on Count Two, for obstructing the work of IRS agents, in violation of 26 U.S.C. § 7212(a). His challenge is without merit.

In reviewing the sufficiency of the evidence to support a criminal conviction, we view the evidence and the reasonable

inferences to be drawn therefrom in the light most favorable to the government, and we must sustain the verdict "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir.) (internal quotation marks omitted), *cert. denied*, 537 U.S. 1031, 123 S.Ct. 555, 154 L.Ed.2d 448 (2002).

Section 7212(a) states that "[w]hoever corruptly or by force or threat of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title ..." shall be guilty of a crime. 26 U.S.C. § 7212(a). We have interpreted the term "corruptly," as found in this statute, to mean acting "with the intent to secure an unlawful benefit either for oneself or for another." *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir.1997).

Count Two charged Stern with violating 26 U.S.C. § 7212(a) by corruptly endeavoring "to obstruct or impede the due administration of the internal revenue laws...." (J.A. 84). Viewing the evidence in this case, and the reasonable inferences to be drawn therefrom, in the light most favorable to the government, leads to the inescapable conclusion that a rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged in Count Two. We hold that Stern's actions in mailing physically and legally threatening communications to the IRS agents involved in his case in order to halt their collection activities, as well as his action in posting the threatening "no trespassing" sign at the entrance to his property directed to federal law enforcement officers and federal civil servants, are sufficient to sustain his conviction on Count Two.

III.

We next address Stern's challenge to the sufficiency of the evidence to sustain his conviction on Count Three for bank fraud, in violation of 18 U.S.C. § 1344. With respect to this count, Stern only challenges the sufficiency of the evidence to establish that First Union was federally insured at the time of his offense conduct; an essential element of his federal bank fraud offense. 18 U.S.C. §§ 20, 1344; *see, e.g., United States v. Brandon*, 17 F.3d 409, 424 (1st Cir.1994). Stern's challenge is without merit.

At Stern's trial in July 2000, the government sought to prove First Union's federally insured status at the time of Stern's conduct as charged in Count Three (i.e., December 16, 1995) via a certificate issued by the Federal Deposit Insurance Corporation (FDIC) on February 26, 1998. The certificate certified that "the deposits of each depositor in" First Union "are insured to the maximum amount provided by the Federal Deposit Insurance Act." (J.A. 1025-H). The government introduced this FDIC certificate through the testimony of First Union district manager Victor Cordone (Cordone). The government showed Cordone the 1998 FDIC certificate and asked him to identify it. In response, Cordone testified: "This is our certificate from the FDIC." (J.A. 402). The government then asked: "What does that mean?" Id. Cordone responded: "This is just a notice that we publish out in the office that we are in fact insured for all depositors up to $100,000." (J.A. 402). Stern argues the February 1998 FDIC certificate offered by the government and Cordone's testimony does not collectively prove the federally insured status of First Union on December 16, 1995. Rather, he claims, such evidence only proves First Union's federally insured status a little over two years after the criminal conduct charged in Count Three.

We, ourselves, are puzzled as to why the government did not take a more straightforward approach in proving the

federally insured status of First Union as of December 1995. For example, the government could have submitted an FDIC certificate for First Union contemporaneous with that time. Nevertheless, we hold a rational trier of fact, viewing the 1998 FDIC certificate and Cordone's testimony in the light most favorable to the government, could have found that First Union was federally insured at the time of Stern's conduct as charged in Count Two.

Our holding is supported by our decision in *United States v. Safley*, 408 F.2d 603 (4th Cir.1969). In Safley, the defendants challenged their federal bank robbery convictions on the ground that "the evidence was insufficient to establish that the deposits of the bank were insured by the [FDIC]." Id. at 605. At trial, a bank employee had testified that the deposits " 'are' insured by the [FDIC]." Id. We observed that this testimony, taken literally, could have referred to the time of trial. Id. We also observed that, when considered in context, the testimony could have referred to the time of the robbery. Id. On appeal, we held that the testimony, when viewed in the context of all the evidence, was sufficient to prove the federally insured status element, since the "jury could draw the reasonable inference that the bank was insured at the time of the robbery." *Id.*

The logic of *Safley* applies equally in the present case. From the evidence of insurance in the present case (*i.e.*, the 1998 FDIC certificate and Cordone's testimony), the jury could have drawn the reasonable inference that First Union was federally insured in December 1995. Critical to our conclusion is the fact that Cordone, similar to the bank employee in *Safley*, testified, in referring generically to the FDIC certificate in front of him, that "we are in fact insured for all depositors up to $100,000." (J.A. 402) (emphasis added). In sum, we affirm Stern's bank fraud conviction.

IV.

Following an overview explanation of the district court's sentencing calculations with respect to Stern, we will address two of Stern's numerous challenges to his sentence under the United States Sentencing Guidelines (Sentencing Guidelines or USSG).

The district court determined Stern's Criminal History Category under the Sentencing Guidelines to be Category I. In determining Stern's offense level under the Sentencing Guidelines, the district court used the grouping rules, USSG Ch.3, Pt. D, to group the seven counts on which Stern was convicted into four groups. The first group consisted of Counts One (18 U.S.C. § 286) and Three (18 U.S.C. § 1344). The second group consisted only of Count Two (26 U.S.C. § 7212(a)), and produced the highest sentencing range of all the groups at 87 to 108 months' imprisonment.[1] The third group consisted of Counts Four (§ 115) and Six (§ 876); while the fourth and last group consisted of Counts Five (§ 115) and Seven (§ 876). With the addition of offense levels as provided in USSG § 3D1.4, Stern had a combined adjusted offense level of 32. When this number was combined with Stern's Criminal History Category of I, Stern had a sentencing range of 121 to 151 months' imprisonment. The district court sentenced Stern to the highest sentence in this range.

A.

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[1] While the revised Presentence Report recommended that Count Two be grouped with Counts One and Three, for a total of three sentencing groups as opposed to four, we find no error in the district court's treatment of Count Two as a separate group, for a total of four sentencing groups as opposed to three, pursuant to USSG § 3D1.1.

We first address Stern's challenge to the district court's application of a six level enhancement to his base offense level for Counts Four and Six (Group Three), and Counts Five and Seven (Group Four), respectively, pursuant to USSG § 2A6.1(b)(1), for conduct evidencing Stern's intent to carry out his kidnapping threats against Judges Mullen and Voorhees. His challenge is without merit.

USSG § 2A6.1(b)(1) provides for a six level increase in a defendant's base offense level for violation of 18 U.S.C. § 115 and § 876 "[i]f the offense involved any conduct evidencing an intent to carry out such a threat." Commentary to this Guideline provides that:

> In determining whether subsection[ ](b)(1) ... appl[ies], the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole.

USSG § 2A6.1, comment. (n.2). "We review de novo a district court's application of the Sentencing Guidelines to a given factual scenario." *United States v. Worrell*, 313 F.3d 867, 878 (4th Cir.2002) (reviewing challenge to USSG § 2A6.1(b)(1) enhancement).

The record supports the district court's determination that Stern exhibited conduct evidencing his intent to carry out his kidnapping threats against Judges Mullen and Voorhees. Critical, in our view, is the evidence that Stern was the Chief Justice of Our One Supreme Court, a court largely created by him and which had a court rule providing that its dictates would

be enforced by armed militia. Stern also kept many firearms at his home within easy reach, some of which he kept loaded. When all of this evidence is considered, as a whole, with Stern's threats in the kidnapping documents to use Our One Supreme Court's "lawful special appointed constables [to] make appropriate apprehension of" Judges Mullen and Voorhees unless such individuals met the court's demand to release John Anthony Norris, the conclusion is inescapable that Stern engaged in conduct substantially and directly connected to the offense, which evidenced his intent to carry out the threats. Accordingly, we uphold the district court's enhancements pursuant to USSG § 2A6.1(b)(1).

B.

We next address Stern's challenge to the district court's enhancement of his base offense level for grouped Counts One and Three (Group One) by two levels, pursuant to USSG § 2F1.1(b)(4)(A).[2] Enhancement under this Guideline section is appropriate if the offense or offenses at issue involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency...." *Id.*

The revised Presentence Report for Stern recommended that the enhancement apply on the basis that:

> The evidence reflects Stern created and used an illegal religious/political court entitled the "Our One Supreme Court" to facilitate/legitimize the submission of the fictitious comptroller

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[2] Effective November 1, 2001, USSG § 2F1.1 was deleted by consolidation with USSG § 2B1.1. See USSG App. C, amendment 617.

> warrants. This common law court was created to oppose the laws, rules and regulations established by the United States of America.

(J.A. 1130). Stern objected to the enhancement, but the district court overruled the objection on the reasoning of the revised Presentence Report.

On appeal, the government asserts that Stern's use of the comptroller warrants qualifies as a misrepresentation that he was acting on behalf of a government agency, because Government Exhibit 12-1, which is representative of the numerous comptroller warrants that Stern and others attempted to submit to First Union National Bank and other financial institutions, shows that it is redeemable at the "office of the PostMaster," (J.A. 1025-A), and would be drawn on an account with the "Treasurer United States of America." *Id.*

We agree with Stern that the district court erred in applying the enhancement. The record is devoid of evidence that, in attempting to negotiate the so-called comptroller warrants, Stern made a misrepresentation that he was acting on behalf of a charitable, education, religious, or political organization, or a government agency. Critically, in attempting to negotiate the comptroller warrants, Stern only represented himself as the drawee on such warrants. There is no evidence in the record to even suggest that he represented that he was acting on behalf of the United States Treasury or the Postal Service in attempting to negotiate the comptroller warrants. In sum, the district court erred in applying a two level enhancement pursuant to USSG § 2F1.1(b)(4)(A).

Unfortunately for Stern, however, even without the § 2F1.1(b)(4)(A) enhancement, pursuant to the correct application of the Sentencing Guidelines for "Determining the

Combined Offense Level," USSG § 3D1.4, his sentencing range is the same. Accordingly, the district court's error in applying the § 2F1.1(b)(4)(A) enhancement is harmless and a remand for resentencing is unnecessary.

V.

In conclusion, we affirm all of Stern's convictions and his sentence.[3]

AFFIRMED.

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[3] We have reviewed Stern's remaining assignments of error and find them to be without merit.

United States District Court
For the Western District of North Carolina
Bryson City Division
Docket No. 2:99-CR-0081-1

United States of America	)
	)
Plaintiff,	)
-vs-	)
	)
Peter Kay Stern,	)
a/k/a Peter K., Stern,	)
Defendant.	)

Transcript of Proceedings
Volume IV
Before: Honorable Lacy H. Thornburg
United States District Court Judge

At Asheville, North Carolina
Thursday, July 20, 2000
9:00 a.m.

* * *

[852] MR. BROWN: When that letter came in, there was concern for the safety of two U.S. District Court Judges. Did he carry them out? No. Did he ever attempt to carry them out? We don't know.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

United States of America,	)
	)
-VS-	)Docket No: 2:99-CR-00081-1
	)
Peter Kay Stern,	)
	)
Defendant.	)

Transcript of Sentencing Proceedings
Before the Honorably Lacy H. Thornburg
United States District Court Judge
Wednesday, January 23, 2002

* * *

[75] THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Peter Kay Stern, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 151 months on Count Three, and 36 months on Count Two, and 60 months on each of Counts One, Four, Five, Six, and Seven, all Counts to be served concurrently.

United States District Court
For the
Western District of North Carolina

United States of America	)
	) Presentence Investigation
-vs-	) Report
	) Docket No.: 2:99CR81
Peter Kay Stern, a/k/a Peter K., Stern,)	)

Prepared For:	The Honorable Lacy H. Thornburg U.S. District Judge
Prepared By:	Dwayne Capps Senior U.S. Probation Officer Asheville, NC

* * *

[15]

66. **Specific Offense Characteristic:** Pursuant to U.S.S.G. § 2A6.1(b)(1), "*If the offense involved any conduct evidencing an intent to carry out such threat, increase by 6 levels.*" Given the facts of this case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and the kidnaping/apprehension threat issued to U.S. District Court Judge Mullen in January 1996. Mr. Stern had already established his common law court in Franklin, NC, and had previously threatened IRS agents with their arrest to be carried out by his court appointed constables. The evidence shows that defendant had the means to carry out such treats, therefore, a 6-

level enhancement is applied.

* * *

[16]

72. **Specific Offense Characteristic:** Pursuant to U.S.S.G. § 2A6.1(b)(1), "*If the offense involved any conduct evidencing an intent to carry out such threat, increase by 6 levels.*" Given the facts of this case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and the kidnaping/apprehension threat issued to Chief U.S. District Court Judge Voorhees in January 1996. Mr. Stern had already established his common law court in Franklin, NC, and had previously threatened IRS agents with their arrest to be carried out by his court appointed constables. The evidence shows that defendant had the means to carry out such treats, therefore, a 6-level enhancement is applied.